No. 85-828

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL UNION 542,
INTERNATIONAL UNION OF OPERATING ENGINEERS,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA

and

RAYMOND WILLIAMS, WILLIE MCKAY, MARION J. EADDY, RANDOLPH HUGHES, JR., AREL BROWNLEE, WILLIAM BOSTIC, KENNETH HOWARD, ALPHA CHRISTMAS, RONALD RICHARDSON, CLARENCE WINDER, RONALD CRAWFORD and FRANK GILCHRIST, on their own behalf and on behalf of all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents assert that this case is moot. That assertion, as we show in part 1, *infra*, is simply wrong. This case is not moot: the order establishing the racial quotas that are the subject of this petition has *not* expired and is to remain in effect until at least August 31, 1987.

Respondents contend, in addition, that this petition is "premature" because petitioner has made subsequent challenges to the quotas here which have not yet been resolved by the courts below. But, as we also show in part 1, the rulings made by the courts below on the questions presented in our petition are the law of the case in those

courts. The subsequent challenges to which respondents refer are not challenges to the power of the courts to order racial quotas under Title VII or § 1981 but to the particular numerical percentages used in the quotas here. Even if petitioner were successful in those challenges, all that would result would be a reduction in the percentages specified in the quotas, not the elimination of the quotas; the questions presented here would remain.

Respondents also attempt to obfuscate—but they do not and could not dispute—the critical facts here. As we show in part 2, the record is clear that the racial quotas here require that preferences be given to blacks solely on the basis of their race, and not because they are victims of discrimination, at the expense of innocent whites.

1. *Mootness and Prematurity.* Respondents' contention that this case is moot rests on a single premise: "the district court order being challenged here, Post Decree Order #78, App. at 14a-15a, has now expired." Resp. Br. 8. That premise is false. As the materials attached to Respondents' own brief establish, Post Decree Order No. 78 never expired and will remain in effect until August 31, 1987.

The injunctive decree in this case, including the racial quotas embodied in Post Decree Order No. 78, was scheduled, by its terms, to "terminate on August 31, 1985 *unless, prior to that date, good cause is shown for an extension* . . . ." (Pet. App. 271a) (emphasis added). And, on July 30, 1985—more than a month before the August 31, 1985 date—the district court, having found that good cause had been shown for an extension, extended the decree for two years.[1] As the district court explained in

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[1] See Order, dated July 30, 1985 (Appendix A to Resp. Br.). In that order, the district court stated that "the Consent Decree which was previously entered in the above-captioned action is hereby extended for a period of two (2) years from August 31, 1985 . . . ." The order mistakenly refers to the decree involved here as "the Consent Decree." There was a separate Consent Decree in this case, which provided for monetary compensation to the victims of past discrimination (see Pet. App. 243a-252a). But the Consent

a subsequently issued memorandum, "on July 30, 1985, this court ordered that the 'Judgment and Decree' originally issued by this court on November 7, 1979, as revised on August 12, 1983 (Post Decree Order #73), which *was* to expire on August 31, 1985, be extended for two years" (Appendix B to Resp. Br., Exhibit "A," at p. 3a) (emphasis added).[2] Specifically, with respect to Post Decree Order No. 78, the District Court ordered that "*Post Decree Order No. 78 is to remain in effect for the duration of the Decree*, to wit, 40 percent of all referrals are to go to minorities in District 1, and 17 percent of all referrals are to go to minorities in District 5."[3] The "duration of the decree" is at least until August 31, 1987. Thus, Post Decree Order No. 78—the order respondents say has expired—"is to remain in effect" at least until August 31, 1987. This case is not moot.

Similarly, respondents misstate the posture of this case when they contend that petitioner is presently pursuing two appeals in the Third Circuit and a motion in the district court which could resolve the issues presented here. The opinion of the Third Circuit from which review is sought settled definitively, as far as the courts below are concerned, the questions presented in this petition—whether courts are authorized to award racial quotas as remedies for violations of Title VII or § 1981. That ruling is the law of this case in those courts. There is thus *no* possibility that, without the intervention of this Court, the courts below will alter that ruling. And, precisely for that reason, petitioner has not asked either of the courts below to do so. Indeed, petitioner directly stated in its

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Decree did not encompass matters of ongoing injunctive relief. The injunctive relief in this case was set forth in a decree that was not a consent decree (see Pet. App. 205a-239a, 253a-272a). It was the injunctive decree that the district court extended for two years.

[2] Post Decree Order No. 73, which is referred to in the quoted passage, is set forth in Appendix K of the Pet. App.

[3] Modification Decree, dated October 9, 1985, ¶ 3 (Appendix B, Exhibit "B," to Resp. Br., at p. 13a) (emphasis added).

brief to the Third Circuit in one of the appeals mentioned by respondents—the only appeal that has been briefed—that "this Court [the Third Circuit] has previously established the law of the case on [the issue whether the district court had authority to order any racial quota], and we therefore do not address the issue . . . ." [4] The appeals and motion to which respondents refer thus do not ask the courts below to decide the authority of courts to issue racial quotas, but instead take that authority as given—unless and until this Court rules to the contrary—and urge that the particular numerical percentages in the quotas here be *reduced*. Even if petitioner were completely successful in those efforts, all that would result would be reduction of the percentages in the quotas, not the elimination of the quotas; the questions presented here would remain.

In short, the order under challenge here has not expired but remains in effect. The order affects the same people in the same way as before. It is the law of this case in the courts below that the district court has authority to order racial quotas under Title VII and § 1981. In the subsequent proceedings, those courts have not been asked to, and will not, eliminate the racial quotas, absent the intervention of this Court. In these circumstances, it is preposterous to maintain that to obtain review by this Court petitioner should be "required . . . to start all over again" by seeking review in the lower courts of the order that extended the life of Post Decree Order No. 78. *Bank of Marin v. England*, 385 U.S. 99, 101 (1966). See also *Costle v. Pacific Legal Foundation*, 445 U.S. 198, 210 (1980); *Schall v. Martin*, —— U.S. —— 104 S.Ct. 2403, 2405 n. 2 (1984). *Cf. Firefighters Local 1784 v. Stotts*, —— U.S. —— 104 S.Ct. 2576, 2583 (1984) (even if the injunction under review had expired, the case would not be moot because the "rulings [upon which the injunction was based] remain undisturbed" and may continue to affect the parties).

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[4] Brief of Defendant-Appellant Local 542 in *Commonwealth of Pennsylvania v. Local 542*, 3rd Cir. No. 85-1450, at p. 18 n. 35.

Further, were respondents' position on mootness and prematurity to prevail, petitioner might well be precluded ever from bringing the questions presented here to this Court. It has taken petitioner approximately 18 months to bring the instant challenge to this stage. If each time the district court extends the decree in this case for a short term, petitioner is required to drop its pending challenges to the decree and begin again, petitioner may never be able to complete the appellate process before the next extension is granted. See *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911). And see generally *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978). In the meantime, the innocent white employees will continue to suffer from the same racial quotas as before the extension was granted.

2. *The Merits*

Respondents do not dispute that the quotas operate precisely as described in the petition: every minority member of Local 542 is granted a preference, solely because of his race, in the making of job referrals; the Union is required to give 40% of all referrals—and 70% of all *dispatches*—to minorities who comprise only 13% of the membership; and as a result, those white members who rely on the hiring hall in order to make a living must remain unemployed far longer than comparably situated minorities before being dispatched to a job. Pet. 10-12. On these facts, the questions presented by the petition respecting the authority of the courts to impose racial quotas under Title VII and § 1981 are squarely posed and should be resolved by this Court.[5]

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[5] Respondents' contention that other circuits share the views of the court below on these questions only heightens the need for this Court to address the matter; for the courts that have embraced the views adopted by the court below have done so by disregarding the decision of this Court in *Stotts* and the manifest intent of Congress. See Pet. 18-22; and see the Brief of Local 542, International Union of Operating Engineers and Local 36, International Association of Firefighters, AFL-CIO, as *Amicus Curiae* in Support of Petitioners in *Local 28, Sheet Metal Workers' Assn. v. EEOC*,

While not disputing those critical facts, respondents attempt to obfuscate the matter by mischaracterizing the nature of the quotas. First, respondents characterize the quotas as merely providing a remedy to "actual victims of discrimination" (Resp. Br. at 11 n. 11), and, rather than harming innocent whites, as simply divesting white members of " 'illegitimate' entitlements" (*id.* at 6). Second, respondents assert that the quotas do nothing more than prevent future discrimination by Local 542 (*id.* at 9, 11 n. 11). Neither of these characterizations can be squared with the nature of the quotas at issue here.

a) A Consent Decree entered in this case identified by name the persons who were victims of the discrimination found by the court,[6] and awarded them compensatory relief in resolution of their claims. See Pet. 7; Pet. App. 243a-252a. Thus the quotas, which require the Union to grant a preference to all minority members, extend a benefit to victims of past discrimination *whose claims for compensation were settled by the Consent Decree*, as well as to non-victims *who never had a valid claim*—indeed, as respondents do not deny, to minorities who were not old enough to be members of the union when the illegal discrimination occurred (Pet. 12). As to neither group (let alone both) do the quotas constitute compensation awarded as a remedy for actual losses suffered due to discrimination.

No. 84-1656, and *Local Number 93, International Association of Firefighters v. City of Cleveland*, No. 84-1999.

[6] In asserting that "the entire class of minorities involved in this case was held to be victimized" (Resp. Br. at 11 n. 11), respondents cite a passage from the district court's 1978 decision which merely stated that class certification was proper because "[p]otentially . . . , every class member . . . has suffered from the alleged [discrimination]." 469 F. Supp. at 388 (Pet. App. 134a-135a). Respondents do not deny that those who *actually* suffered from such discrimination were subsequently identified in the Consent Decree, which resolved their claims.

Nor is it the case that by depriving white members of the opportunity to work, the quotas merely divest those employees of "'illegitimate' entitlements" (Resp. Br. at 6). Were it not for the quotas, all members—black and white alike—would be referred to jobs on the basis of the length of time they have been out of work. See Pet. 7, 16 n. 14. The length of time that a person has been out of work is hardly an "illegitimate entitlement."[7]

Thus, the quotas give preferences to minorities solely on the basis of race, and not because they are victims of discrimination, at the expense of innocent whites.

b) Maintaining that the quotas merely "provide minorities with the amount of work they should have received absent a process of systematic discrimination by Local 542" (Resp. Br. at 9), respondents argue that the quotas are justified as a means of preventing future discrimination by the Union (*id.* at 11 n. 11). Again, this contention cannot be squared with the nature of the quotas here.

The quotas obviously are not designed to produce the results that would be expected in the absence of discrimination by Local 542. The quotas require the Union

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[7] The courts below characterized the referral system as a "seniority system" and stated that the system had been found not to be bona fide. See App. 9a, 39a-40a. This was a reference to the fact that the district court found in 1978 that the Union had engaged in intentional discrimination by failing to follow its own hiring hall rules. App. 39a-40a; see Pet. 6-7. It is undisputed that if those rules were followed, referrals would be based on the length of time that a member has been out of work, not on the length of time that a person has been a member of the Union or on any other factor that could possibly be characterized as an "illegitimate entitlement." Thus, the "seniority" aspect of this case does not make a racial quota any more appropriate here than in a case of a hiring or promotion discrimination or any other type of discrimination. And, § 706(g) of Title VII, which we submit prohibits the courts from imposing racial quotas, applies by its terms to *all* types of violations, and expressly applies to cases where "the [defendant] has intentionally engaged in . . . an unlawful employment practice . . . ."

to give more than 70% of all dispatches—the only referrals controlled by the Union—to minorities, who comprise 13% of the membership. Pet. 10-11 and n. 12. This dispatch rate for minorities far exceeds what would be expected in the absence of discrimination.[8] And, it is undisputed that these inflated quotas have been adopted in order to counterbalance the failure of *employers*—who are not parties to the decree and have not been found to have committed any violation—to utilize minorities, and to recall them to jobs, at a rate deemed appropriate by the district court. See Pet. 9-10; see also Appendix B, Exhibit "A," to Resp. Br., at p. 7a. Thus the referral quotas cannot be characterized, as respondents suggest, as a mere prohibition of future discrimination by the Union.[9]

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[8] Respondents assert that Local 542 has a "practice of providing whites with far more lucrative referrals than it provides to minorities," and that an inflated referral quota "is necessary to offset [this] current referral discrimination by Local 542." Resp. Br. at 9, n. 9. The district court made no such finding in adopting the quotas, and there is nothing in the record that would have supported such a finding. The only support cited by respondents is an affidavit filed two weeks ago in the district court by respondents' statistician. That affidavit merely states that the average length of time worked on a job by a minority is less than the average time worked by a white. Notably, the affidavit does not state that this is a result of discrimination by Local 542. The fact is that the length of time an employee works on a job is determined not by the Union but by the contractors—the very contractors who have been recalling minorities to jobs at a rate far below the rate at which the Union has been dispatching minorities to jobs. See *infra*, note 9.

[9] Respondents note that in a recent order the district court declared that the Union is using the hiring hall as "a tool of discrimination." Resp. Br. at p. 9. See also *id.* at pp. 7, 10. 11 n.11. This "finding" was relied upon by the district court not as the basis for the quotas, but as the basis for appointing a Hiring Hall Monitor. See Appendix B, Exhibit "A", to Resp. Br., at 9a. In any event, a review of the district court's opinion will reveal that what the court referred to as "discrimination" was nothing more than the fact that the Union had given "only" 40% of the dispatches in District 1 to minorities (*id.* at 6a-7a)—a percentage which, as the

What is more, respondents beg the very question presented here because implicit in their characterization of the quotas is the assumption that Title VII and § 1981 protect racial groups rather than individuals. Many white members receive no employer recalls and must rely wholly upon hiring hall dispatches for work. Only if Title VII and § 1981 protect racial groups rather than individuals could it be proper to require the Union to deny a dispatch to a white member who has been out of work for many months, and to give that dispatch instead to a minority member who has only been out of work for a few days, in order to "counterbalance" the fact that *other* white members have been recalled more frequently, or kept on the job longer, than minority members by the contractors. More fundamentally, only if Title VII and § 1981 were construed to protect racial groups rather than individuals could a remedial decree take the form of a quota requiring the use of race in making employment decisions, rather than an injunction *against* the use of race. The Court described the latter form of relief as appropriate in *Teamsters v. United States*, 431 U.S. 324, 361 (1977). Whether the very opposite form of relief—a decree requiring, rather than

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district court noted, failed to satisfy the 40% quota for referrals only because of "the employer recall feature" (*id.* at 7a) (that is, while the Union gave minorities 42.5% of the dispatches, the contractors gave minorities only 13.3% of the recalls (*ibid.*)). In like manner, respondents measure the Union's so-called on-going "discrimination" by the extent to which minorities have worked less than 18% of the hours in the industry (see Resp. Br. at p. 9, and App. B thereto at 6a). The Master, who conducted the evidentiary proceedings regarding the extension of the decree, expressly found that there was no proof that the Union was engaging in any discriminatory practices in the hiring hall. Master's Interim Report on Year 4 and Year 5 Minority Hours and Wages, at p. 18. Indeed, the Master emphasized that "the present administration of the Union has exhibited a deep concern with compliance . . . ." *Id.* at p. 11. Nor did the district court—or, for that matter, the respondents—point to any fault on the Union's part respecting job referrals other than the failure to give more than 40% of all dispatches to minorities.

forbidding, the use of race as a criterion for job allocation—is within the authority of the courts under Title VII and § 1981, is the question presented here.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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